No. 15528

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
a corporation,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

PETITIONER'S OPENING BRIEF

JOHN A. CARVER, JR.,
Continental Bank Building
Boise, Idaho

DALE CLEMONS,
Idaho Building,
Boise, Idaho,
Attorneys for Appellant.

....Clerk

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PETITIONER'S OPENING BRIEF

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Now comes United Mercury Mines Company, a corporation, the Petitioner on Review (appellant) by its attorneys, John A. Carver, Jr. and Dale Clemons, and respectfully shows:

I

JURISDICTION

Petitioner on Review, United Mercury Mines Company, a corporation, is a corporation organized and

existing under the laws of the State of Idaho. (R. 28)*

On March 9, 1945, the appellant filed its tax return for the calendar year 1944 with the Collector (now Director) of Internal Revenue for the District of Idaho (R. 28), which office is located in Boise, Idaho, within the jurisdiction of the United States Court of Appeals for the Ninth Circuit where this review is sought.

The Respondent on Review is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States.

This petition for review is brought pursuant to 26 U.S.C.A. Sections 7481 to 7483 (Sections 7481 to 7483 Internal Revenue Code).

II

PRIOR PROCEEDINGS

On March 9, 1944 the appellant (petitioner below) filed its tax return with the Collector of Internal Revenue for the District of Idaho, for the calendar year 1944. (R. 28)

On February 1, 1955, (R. 5, 9-19, 21) the Commissioner of Internal Revenue mailed appellant a notice of deficiency for said taxable year 1944.

On April 25, 1955, (R. 3, 20) within ninety days of the date of the said mailing of notice of deficiency, the appellant filed its petition before the Tax Court of the United States for a redetermination of the

*Arabic numerals following the letter R. refer to pages of the Transcript of Record.

deficiency set forth in said notice dated February 1, 1955.

On December 26, 1956, the Tax Court of the United States filed and entered its opinion sustaining the determination made by the Commissioner of Internal Revenue (R. 37) and on December 26, 1956 entered its decision awarding a deficiency in excess profits tax for the year 1944 in the amount of $113,453.68 (R. 38).

On March 22, 1957, (R. 39-40) the appellant filed with the said Tax Court of the United States its petition for review, and on April 9, 1957, filed with said court its Designation of Contents of Record on Appeal, (R. 40).

On April 26, 1957 the Clerk of the said Tax Court filed with the Clerk of the United States Court of Appeals for the Ninth Circuit the Record on Review (R. 149-150).

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

So far as they go, the Tax Court's Findings of Fact (R. 27-35) (save the last two, which, of course, are really conclusions of law) fairly state the operable facts, and will not be repeated here.

Suffice it to say that Petitioner had been involved in a continuous course of activity since 1921 for the prospecting, location or other acquisition and development of certain mining properties (Stip. Facts, par. 4; R. 24, 100), (including exploration, blocking out of ore, construction of workings and service

facilities) (R. 32-33, 36, 56, 57-59, 63-64, 66-67, 76) both before and after they were subjected to contracts with Bradley Mining Company giving Bradley the right to work them exclusively. It had a capital commitment of several hundred thousand dollars (R. 79, 84-86, 112) in the general area. It engaged actively in operating nearby properties, including the extraction of ore, and its income was not confined to royalty payments (R. 13-14, 26-27). It was instrumental in getting the properties contracted to Bradley drilled, (R. 73, 76-78, 143) and in getting electric power to the area (R. 88). It voluntarily bore a portion of the cost of construction of treatment facilities for the ore mined by Bradley, (R. 92-95, 97) and bore a disproportionate share of the cost of transportation of the ore from Cascade to Boise, Idaho (R. 98).

The petitioner has been granted a depletion allowance for the tax year in question (R. 100).

Nevertheless, since Bradley, and only Bradley, extracted the ore from the earth in 1944, Petitioner has been denied the exemption of Section 731, and the controversy is whether the Petitioner's adjusted excess profits net income for the year 1944 was or was not exempt by virtue of Section 731 of the Internal Revenue Code.

Petitioner's contention is that it was engaged in the mining of tungsten, during the year in question, and that its adjusted excess profits net income was attributable to such mining and therefore exempt from the excess profits tax.

In this connection, Petitioner makes these contentions:

(1) *Oregon Chrome Mines, Inc., vs. Commission,* 192 F (2d) 783, held by the Tax Court to be controlling in the instant case, should not control for these reasons:

(a) In that case, the Tax Court had found that Petitioner was not "engaged in mining" in the usual and ordinary definition, having remained passive, performed no function, and taken no risk, and was not engaged in other mining. As to these tests, the cases are not parallel.

(b) It was unnecessary, and dictum, for this Court, therefore, to make its decision rest upon the test of "extraction," since the Petitioner there was not engaged in mining in the usual and ordinary sense of the term.

(2) *Oregon Chrome Mines, Inc. v. Commissioner* applies an improper and erroneous test to determine exemption and the rule stated ought to be corrrected now.

(a) It was error for the Tax Court to consider itself bound by *Oregon Chrome. Oregon Chrome* is not parallel on the facts, and the "extraction" test was unnecessary and dictum.

(b) The legislative history and statutory context of Section 731 shows that the term "engaged in mining" is broader than the term

"extracts minerals," and should not be so limited in determining exemption under Section 731.

SPECIFICATION OF ERRORS RELIED UPON

The Tax Court erred:

(1) In denying Petitioner the exemption claimed under Section 731, Internal Revenue Code, as to its adjusted excess profits net income for the year 1944.

(2) The Tax Court erred in failing to find that Petitioner was engaged in mining tungsten in 1944, within the meaning of Section 731, I.R.C.

(3) The Tax Court erred in holding *Oregon Chrome Mines, Inc. vs. Commissioner*, 192 F(2d) 783, to be controlling.

ARGUMENT

It was error for the Tax Court to consider itself bound by *Oregon Chrome. Oregon Chrome* is not parallel on the facts, and the "extraction" test was unnecessary and dictum.

Since the consideration of this case involves, we believe, a reanalysis of the *Oregon Chrome* case, upon which the Tax Court based its decision, the Court is respectfully urged to review the majority and minority opinions in the Tax Court opinion in that case, and to compare the position of the Petitioner there with the position of the Petitioner here.

It will be seen immediately that the Tax Court's 5-4 split turned upon weaknesses in the petitioner's factual position in the precise areas where petitioner

here is strong; that the reasons asserted by the minority judges for their dissent apply with special force; and that the petitioner here could satisfy the somewhat equivocal reasons announced by the majority judges for their decision.

The following of dictum is perhaps not precisely the proper term to describe the error, as the Petitioner conceives it, of the application of *Oregon Chrome* to the instant case.

We think this Court selected a new reason for affirmance, not considered in the Tax Court. For reasons set forth hereafter we think the reason given not supportable. But we also think the Tax Court should have held, in this case, that the application of the "extraction" test was not necessary to affirm *Oregon Chrome*, and therefore it should not have held itself bound by it. To do so was error.

To say that United Mercury Mines Company was not engaged in mining in 1944 is impossible. On the facts, *Oregon Chrome* is not at all a parallel for denying the exemption, for there the activities were so absent, the role so passive, as to deny the exemption.

Oregon Chrome Mines, Inc. vs. Commissioner applies an improper and erroneous test to determine exemption and the rule stated ought to be corrected now.

(a) *The Legislative history and statutory context of Section 731 shows that the term "engaged in mining" is broader than the term "extracts minerals," and should not be so limited in determining exemption under Section 731.*

The Second Revenue Act of 1940, added to the Code the Excess Profits Tax Act of 1940, and Section 731 therein contained the first use of the term "engaged in mining of (listed strategic materials)."[1]

There was in that act no relief measure for non-strategic mineral producers, comparable to Section 735 which was added later, as will hereafter be noted.

Under this Act, the Treasury issued a ruling (I.T. 3482, copied in the Appendix, p. 22) as to the meaning of Section 731, determining that the test to determine whether income is attributable to mining will be that followed to determine "gross income from the property" as defined in Section 19.23(m)-(1) (f) of Regulations 103. In other words, "under such circumstances as would entitle the producer of such natural resources to a depletion allowance with respect thereto."

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[1]"Section 731. Corporations Engaged in Mining of Strategic Metals.

"In the case of any domestic corporation engaged in the mining of tungsten, quicksilver, manganese, platinum, antimony, chromite, or tin, the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this subchapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income."

This test was incorporated in the statute by the later enactment of Section 114(b) (4) (B), February 25, 1944 (Appendix, p. 19).

In the meantime, the 1940 enactment of Section 731 had been made inapplicable to years beginning after December 31, 1940 (Revenue Act of 1941, September 20, 1941, c. 412, Title II, Section 204), and when on October 21, 1942, it was re-enacted, the Congress added Section 735 (Appendix, p. 21).

Thus, in 1942, by these two sections the Congress provided relief from the excess profits tax with reference to production of certain minerals, strategic minerals in Section 731, and non-strategic minerals in Section 735.

The late Senator Walter F. George referred to the motivation for strategic minerals in this language:

> "The World War II excess-profits-tax law provided an exemption for income from the mining of certain specific strategic minerals. These were minerals which were essential to the military effort and were not normally produced in quantity in the United States."

As to the producers of other minerals, Senator George also summarized the theory behind the legislation, saying:

> ". . . applying the principles of the World War II excess-profits tax. The old law provided that, where output exceeded normal output, a certain portion of the income from the increased output would be exempt. This provision applied to

> certain mining, timber, and natural-gas properties, and it gave recognition to the fact that these types of properties are wasting assets, so that their excessive depletion during the period of an excess-profits tax would, in some cases, result in an unfair tax burden."

In *Commissioner vs. Gifford-Hill & Co.* (C.A. 5, 1950) 180 F. (2d) 655, there is judicial recognition that the exemption in Section 735 was to stimulate production of sand and gravel, along with other minerals, to aid in the prosecution of the war.

This Court has said that the word "mining" as used in Section 731 is limited to "extraction of ore from the earth." *Commissioner vs. Oregon Chrome Mines*, 192 F. (2d) 783, 785.

But Congress, it is submitted, did not use the generic term in this limited sense, for two reasons:

First, if Congress had intended the phrase "engaged in mining" to be limited to the meaning of "extraction of ore from the earth" it could have said so, because in Section 735, (enacted the same day) it used the more limited term. "The term 'producer'," states Section 735 (a) (1), "means a corporation which *extracts* minerals from a mineral property." (Emphasis added.)

Second, when the 1942 Revenue Act was enacted, Congress had before it the record of an administrative interpretation (I.T. 3482) which defined broadly the limits of the exemption statute to include income as attributable to mining that which derives

from ordinary treatment processes as set forth in the statute and regulations applicable to the Income Tax law. The significance of this broadening as reflected in the legislative codification thereof as Section 114 (b) (4) (B) was recognized in the majority opinion of the Tax Court in *Oregon Chrome*, in this language:

> "It is possible that Congress intended that the broad definition of 'mining' set forth in Section 114(b) (4) (B) should serve not only to determine income attributable to mining within Section 731, but also that this definition should furnish a guide post for determining whether a corporation was 'engaged in mining' under the same section."

But neither this Court, nor the Tax Court, made reference to the fact that I.T. 3482 had been issued prior to the 1942 enactment of Section 731. The Tax Court did not go as far as this Court, and particularly did not specify that the term "engaged in mining" was limited to "extraction." It is submitted that in the light of the contemporaneous use of that precise language in Section 735, it could not have done so, and this Court should not have.

The Tax Court said that *Oregon Chrome* wasn't engaged in mining by the usual and ordinary definition of the term. An affirmance of this holding could not be quarreled with. But to have gone farther is and was dicta, which should be corrected here.

The truly basic question presented in this case is whether the Court can conclude that Congress in the

use of the generic term "engaged in the mining of . . ." intended the term to be identical with the separately and contemporaneously defined term "producer" in Section 735.

Before proceeding to discuss the anomaly of such a conclusion, further brief note should be taken of an additional concept administratively inserted into the statute prior to its 1942 re-enactment. In I.T. 3482, it is stated, in pertinent part:

> "In view of the foregoing, it is held that the exemption from the excess profits tax provided in said section 731, supra, applies only to the portion of the adjusted excess profits net income of a domestic corporation which is attributable to the mining (including such milling processes as section 19.23 (m)-1(f) of Regulations 103 treats as mining) of strategic metals therein enumerated *under such circumstances as would entitle the producer of such natural resources to a depletion allowance with respect thereto.* The exemption does not apply to that portion of the adjusted excess profits net income attributable to any milling processes of ore mined by others." (Emphasis added.)

Now if the Bureau had conceived the statutory term "engaged in mining" as used when Section 731 was first enacted (when there was no concomitant section 735) to be limited to "producers" in the sense of "extractors," the underscored portion of the above quotation is meaningless, for the question of entitle-

ment to depletion allowance was at that time a developed branch of the law, and the test of economic interest in the ore in place being determined by substance rather than form was well worked out.

We can't assume that the underscored phrase is meaningless; and to give it its usual and ordinary meaning is to have present in 1942, at the time of re-enactment, an administrative interpretation the Congress is held to be aware of.

In this case the Petitioner has been allowed the depletion allowance.

This Court has the duty, we believe, to review the legislative intent evidenced in the phrase "engaged in mining."

Oregon Chrome Mines, Inc. vs. Commissioner applies an improper and erroneous test to determine exemption and the rule stated ought to be corrected now.

(b) *Congress could not have intended to apply harsher exemption rules to strategic mineral production than it did to non-strategic mineral production.*

Deductions from principles of statutory construction pale beside the compulsion of common-sense logic. Congress in 1942 spelled out, in the case of non-strategic minerals, the entitlement of "lessors" to the exemption benefits of Section 735. "The term 'lessor'," it said, "means a corporation which owns an economic interest in a mineral property . . ." A producer is one who extracts. Under Section 711(a)

(1) (I), the producer and the lessor are treated the same with reference to excess output.

In Section 731, instead of using the specific terms "extraction" and "economic interest," the Congress used a generic term. But Section 731 is a complete exemption, Section 735 is a partial exemption. Is it possible to assume that Congress intended a more strict construction with respect to entitlement to the exemption as to strategic mineral production than it did with respect to non-strategic mineral production? Common sense won't permit such a conclusion.

It is argued in this Court's opinion that such a conclusion is aided by reference to the addition of the word "lessor" to the 1950 version of the exemption statute. The fallacy of this is demonstrated by reference to the administrative interpretations codified in Section 114(b) (4) (B), as above referred to.

Furthermore, the legislative history of the enactment of Section 450(d) of the 1950 Revenue Act is devoid of any such indication.

Subsection (d) referring to lessors was added to the reported bill as Committee Amendment No. 6 to H.R. 9827 (81st Congress, 2nd Sess.). But Representative Cooper in explaining such committee amendment (Congressional Record, Vol. 96, 81st Cong. 2nd Sess., p. 16152) says not one word about any intention to broaden the concept of entitlement by adding lessors. Mr. Cooper's remarks are set forth in the Appendix, p. 25.

Similarly, when Senator George, Chairman of the

Finance Committee, explained the bill, there is no hint of broadening the concept of entitlement and a reading of the final paragraph of his remarks (set forth in full in the Appendix, p. 27) certainly militates against any conclusion that Congress intended the Section 735 relief provisions for non-strategic minerals to be available to a wider class of mine owners than was the case for strategic minerals under Section 731.

The exemption from excess profits tax as a method of serving national policy in encouraging the discovery and exploration of needed minerals is much akin to the depletion allowance, and the anomaly of applying a more strict test of entitlement in the case of strategic than non-strategic minerals is compounded by the anomaly of applying such an artificial test at all. The Supreme Court of the United States used applicable language in *Palmer v. Bender*, 287 U.S. 551, 77 L.ed. 489 (1932):

> "The statute makes effective the legislative policy, favoring the discoverer of oil, where valuing his capital investment for purposes of depletion at the date of discovery rather than at its original cost. The benefit of it accrues to the discoverer if he operates the well as owner or lessee, or if he leases it to another. *It would be an anomaly if that policy were to be defeated and all benefit of the depletion allowance withheld because he chose to secure the return of his capital investment by stipulating for a share of the oil produced from the discovered well*

> *through operation by another.*" (Underscoring added.)

The Supreme Court in its remand in *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25, 90 L.ed. 1062, said (7 T.C. 1156):

> "It is settled that *the same basic issue* determines *both* to whom income derived from the production of oil and gas is taxable *and to whom a deduction for depletion is allowable.* That issue is, who has a capital investment in the oil and gas in place and what is the extent of his interest." (Underscoring added.)

The allowability of petitioner's depletion is not in question, and the authority is derivative—but it is compelling. The generic term, "engaged in (the) mining," used contemporaneously with specific definitions, in the light of administrative regulations referred to the economic interest test, and under circumstances where logic requires the generic term to have its full meaning, ought to be given the same tests of substance as worked out in the depletion cases, and ought to be accorded the same dignity of meaning and common sense.

Petitioner further submits that the Tax Court should have distinguished the instant case from the Oregon Chrome case in (1) the factual situation and (2) the Oregon Chrome case did not consider the depletion allowance.

In Oregon Chrome, 192 F. (2d) 783, the Court said:

> ". . . Taxpayer takes the position that the statute does not require that the corporation be engaged in mining in the year the royalties are received . . ."

But note the factual situation as detailed by the Tax Court, 15 T.C. 389, in the same case:

> ". . . petitioner played an entirely passive role in the chrome mining industry . . . and received all of its income in the form of royalties . . . petitioner had performed no function nor taken any financial risk in exploring these mining properties for ore, developing mines, extracting chromite therefrom and marketing the same. Nor was petitioner engaged in any other mining operation during the taxable year. . . . there is no affirmative evidence that petitioner found any mineable deposit of chrome therein . . . the express terms of the lease on that date plus the small capital investment by petitioner refute any conclusion that it completed the exploration and development work there . . . no further steps were taken toward active participation there or elsewhere subsequent to April 14, 1942. Such activity was a mere isolated occurrence . . ."

Each and every point stressed by the Tax Court in the Oregon Chrome case is refuted here. The factual situations between the two cases are diametrically opposed. The decision as applied to the

Oregon Chrome case cannot be either legally or logically applied to this case.

Petitioner herein has been allowed depletion allowance and comes squarely within the administrative interpretation contained in I.T. 3482 set forth above. The only reference to depletion in the Oregon Chrome case appears in the opinion of the Tax Court, 15 T.C. 389:

> "Petitioner has withdrawn its claim that in both 1944 and 1945 it was entitled to the use of cost depletion rather than percentage depletion . . .
>
> As a result of these concessions the sole remaining issue is whether all or any part of the petitioner's adjusted excess profits . . . was exempt . . ."

The question of depletion allowance as being considered by administrative interpretation as a test in determining the excess profits tax exemption, does not appear to have been urged or considered by either court in Oregon Chrome.

Respectfully submitted,

JOHN A. CARVER, JR.
Continental Bank Building,
Boise, Idaho

DALE CLEMONS,
Idaho Building,
Boise, Idaho,
Attorneys for Appellant.

APPENDIX

Section 114(b) (4) (B):

"(B) Definition of gross income from property. As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining,' as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The term 'ordinary treatment processes,' as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of crude mineral products—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combi-

nation of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this sub-paragraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 731 and 735."

> Section 114(b) (4) (B), (Act of February 25, 1944, c. 63, §124(c), 58 Stat. 21; 26 USCA Internal Revenue Acts Beginning 1940, p. 451)

§735. Nontaxable income from certain mining and timber operations, and from natural gas properties.

(a) Definitions. For the purposes of this section, section 711 (a) (1) (I), and Section 711 (a) (2) (K)—

(1) Producer; lessor; natural gas company. The term "producer" means a corporation which extracts minerals from a mineral property, or which cuts logs from a timber block, in which an economic interest is owned by such corporation. The term "lessor" means a corporation which owns an economic interest in a mineral property or a timber block, and is paid in accordance with the number of mineral units or timber units recovered therefrom by the person to which such property or block is leased. The term "natural gas company" means a corporation engaged in the withdrawal, or transportation by pipe line, of natural gas.

> Section 735 IRC (Act of October 21, 1942, c. 619, Title II, §209 (c), 56 Stat. 905; amended Act of October 26, 1943, c. 279, §1, 57 Stat. 575; and amended Act of February 25, 1944, c. 63, Title II, §208 (a-c), 58 Stat. 55-57; 26 USCA Excess Profits Taxes, p. 211.

Regulations 109, Section 30-731-1: 1941-24-10743
Corporations which mine strategic metals I.T. 3482

INTERNAL REVENUE CODE

> The exemption from excess profits tax under section 731 of the Excess Profits Tax Act of 1940 in the case of a domestic corporate taxpayer engaged in the mining of strategic metals applies to that portion of the adjusted excess profits net income attributable to mining and to such milling processes as are treated as a part of mining for depletion purposes under section 19.23(m)-1(f) of Regulations 193, but does not apply to such income attributable to any milling processes of the taxpayer with respect to ore mined by others.

Advice is requested whether the M Company is exempt from the Federal excess profits tax on the adjusted excess profits net income attributable to the operation of a plant constructed by it for the milling of tungsten mined from its own property and also for the milling of tungsten mined by others from properties in that locality which could not be worked unless a mill was available.

Section 731 of the Excess Profits Tax Act of 1940 (Subchapter E of Chapter 2 of the Internal Revenue Code, as added by the Second Revenue Act of 1940), provides as follows:

Corporations Engaged in Mining of Strategic Metals.

> In the case of any domestic corporation en-

> gaged in the mining of tungsten, quicksilver, manganese, platinum, antimony, chromite, or tin, *the portion of the adjusted excess profits net income attributable to such mining* in the United States shall be exempt from the tax imposed by this subchapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income. (Italics supplied.)

In connection with the phrase which is emphasized in the above quotation, attention is directed to section 30.731-1 of Regulations 109, which reads in part as follows:

> (b) . . . The portion of the excess profits net income attributable to such mining is the gross income derived from strategic metals arising out of operations which give rise to "gross income from the property," as defined in section 19.23(m)-(1) (f) of Regulations 103 . . . (less certain items not material here).

In view of the foregoing, it is held that the exemption from the excess profits tax provided in said section 731, supra, applies only to the portion of the adjusted excess profits net income of a domestic corporation which is attributable to the mining (including such milling processes as section 19.23(m)-1(f) of Regulations 103 treats as mining) of stra-

tegic metals therein enumerated under such circumstances as would entitle the producer to such natural resources to a depletion allowance with respect thereto. The exemption does not apply to that portion of the adjusted excess profits net income attributable to any milling processes of ore mined by others.

I.T. 3482, CB 1941, p. 288.

Explanation of Committee Amendment No. 6 by Mr. Cooper (Section 450, IRC):

"Committee amendment No. 6: This amendment deals with the exemption from the excess-profits tax of income attributable to the mining of strategic and critical minerals. Under the World War II excess-profits-tax law, income derived from the mining of strategic minerals was exempt from the tax. The bill as reported contained the provisions of the old law. This amendment adds other minerals to the list of strategic minerals which your committee believes to be in the category of strategic minerals. The amendment extends the same treatment to minerals not specifically named in the bill upon certification by the Defense Minerals Administration as being strategic or critical minerals. In the case of critical minerals, however, the certification applies only in respect of mining from—

"(i) a mineral property which was developed and brought into production subsequent to June 25, 1950; or

"(ii) a mineral property which has been in production prior to June 25, 1950, but was not in production on such date; or

"(iii) a mineral property from which, during the period it was in production during 1946, 1947, 1948, and 1949, the aggregate gross income derived therefrom was less than the aggregate of the deductions (allowable under Section 23, without regard to any

net operating loss deduction) attributable to such property during such period of production."

> 96 Congressional Record, Part 12, 81st Cong. 2nd Sess. p. 16152, December 5, 1950, Remarks of Representative Cooper.

Explanation of Senate Finance Committee Chairman, Mr. George (Section 450 IRC):

"The World War II excess-profits-tax law provided an exemption for income from the mining of certain specific strategic minerals. These were minerals which were essential to the military effort and were not normally produced in quantity in the United States. The House bill provided an exemption for these same minerals and included a number of additional strategic minerals. The new minerals were added to the strategic list after consultation with the National Security Resources Board. Your committee has added molybdenum to the strategic list because of its vital importance to our defense effort.

"In order to keep the list of strategic minerals current with defense demands, the House bill provided for the certification of additional strategic minerals by the agency created to carry out section 303(a) of the Defense Production Act of 1950. Your committee has retained this provision in the bill, but has amended the bill to strike out a provision which gave this agency the authority to certify minerals which are not so strategic as they are critical. Under the House Bill, income from mining these critical minerals would be entirely exempt from excess-profits tax where it was obtained from the operation of new mines, or mines which were closed down at the time of the Korean invasion, or mines which operated at an over-all loss during 1946, 1947, 1948 and 1949. Your committee believed that this pro-

vision was too broad and would result in exemption of income in many cases where such an exemption was not necessary. It was felt that increased output of minerals which were not strategic but were merely critical could be encouraged through subsidies or bonus payments more effectively and at less cost than through excess-profits-tax exemption.

"It was felt by your committee that, except for the special case of the strategic minerals, fair treatment of mineral producers under the excess-profits tax could be achieved by applying the principles of the World War II excess-profits tax. The old law provided that, where output exceeded normal output, a certain portion of the income from the increased output would be exempt. This provision applied to certain mining, timber, and natural-gas properties, and it gave recognition to the fact that these types of properties are wasting assets, so that their excessive depletion during the period of an excess-profits tax would, in some cases, result in an unfair tax burden."

96 Congressional Record Part 12, 81st Cong. 2nd Sess. p. 16771-16772, December 20, 1950, Remarks of Senator George.